

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 27, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CRYSTAL Z.,
Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 1:21-CV-3130-JAG

ORDER GRANTING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF Nos. 15, 18. Attorney D. James Tree represents Crystal Z. (Plaintiff); Special Assistant United States Attorney Benjamin Groebner represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

I. JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income in February 2018, alleging disability since June 1, 2015, due to depression, diabetes, ankylosing spondylitis, disorder of the spine, obesity, and high blood pressure. Tr. 263, 746. Plaintiff's claim was denied initially and on reconsideration, and she requested a hearing before an

ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT - 1

1 administrative law judge (ALJ). Tr. 107, 122, 128. A hearing was held on
2 February 7, 2018, at which vocational expert Becky Hill and Plaintiff, who was
3 represented by counsel, testified. Tr. 15. ALJ Ilene Sloan presided. Tr. 14. The
4 ALJ denied benefits on August 15, 2018. Tr. 12. The Appeals Council denied
5 review on August 13, 2019. Tr. 1. The district court granted stipulated remand on
6 April 15, 2020. Tr. 845-852; 1:19-CV-3228-MKD, ECF No. 20. ALJ Cecilia
7 LaCara presided over a telephonic hearing on June 7, 2021. Tr. 739. Vocational
8 expert Daniel Labrosse and Plaintiff, who was represented by counsel, testified.
9 *Id.* The ALJ denied benefits on July 22, 2021. Tr. 736-755. The ALJ's decision
10 became the final decision of the Commissioner, which is appealable to the district
11 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
12 on October 1, 2021. ECF No. 1.

13 **II. STATEMENT OF FACTS**

14 The facts of the case are set forth in detail in the transcript of proceedings
15 and are briefly summarized here. At the time of the hearing, Plaintiff was 48 years
16 old. Tr. 777. Plaintiff worked as a school bus driver for many years. Tr. 781.

17 **III. STANDARD OF REVIEW**

18 The ALJ is responsible for determining credibility, resolving conflicts in
19 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
20 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
21 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
22 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
23 only if it is not supported by substantial evidence or if it is based on legal error.
24 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
25 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
26 1098. Put another way, substantial evidence is such relevant evidence as a
27
28

1 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
2 *Perales*, 402 U.S. 389, 401 (1971).

3 If the evidence is susceptible to more than one rational interpretation, the
4 Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
5 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.
6 1999). If substantial evidence supports the administrative findings, or if
7 conflicting evidence supports a finding of either disability or non-disability, the
8 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230
9 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be
10 set aside if the proper legal standards were not applied in weighing the evidence
11 and making the decision. *Browner v. Secretary of Health and Human Services*,
12 839 F.2d 432, 433 (9th Cir. 1988).

13 IV. SEQUENTIAL EVALUATION PROCESS

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
16 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
17 through four, the burden of proof rests upon the claimant to establish a prima facie
18 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
19 burden is met once a claimant establishes that a physical or mental impairment
20 prevents him from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
21 416.920(a)(4). If a claimant cannot do their past relevant work, the ALJ proceeds
22 to step five, and the burden shifts to the Commissioner to show that: (1) the
23 claimant can make an adjustment to other work; and (2) the claimant can perform
24 specific jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec.*
25 *Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an
26 adjustment to other work in the national economy, the claimant will be found
27 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).
28

V. ADMINISTRATIVE FINDINGS

On July 19, 2021, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At *step one*, the ALJ found that Plaintiff had not engaged in substantial gainful activity since June 1, 2015. Tr. 742.

At *step two*, the ALJ found Plaintiff had the severe impairments of fibromyalgia, chronic pain syndrome, inflammatory arthritis, obesity, depression, and anxiety. Tr. 742.

At *step three*, the ALJ determined that Plaintiff does not have an impairment or combination of impairments that meets or medically equal one of the listed impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926). Tr. 742.

The ALJ also found that Plaintiff has the residual functional capacity (“RFC”) to perform sedentary work, with the exception that:

the claimant is capable of occasional climbing of ramps or stairs, balancing, stooping, kneeling, crouching, but no climbing ladders, ropes or scaffolds or crawling. She must avoid concentrated exposure to excessive vibrations and all unprotected heights and hazardous machinery. She is limited to low stress work with occasional decision-making and changes in the work setting and with occasional interaction with the public.

Tr 745.

At *step four*, the ALJ found that Plaintiff could not perform past relevant work as a school bus driver. Tr. 753.

At *step five*, the ALJ found that, based on the testimony of the vocational expert, and considering Plaintiff’s age, education, work experience, and RFC, Plaintiff was capable of performing jobs that existed in significant numbers in the

1 national economy, including the jobs of escort vehicle driver, document preparer,
2 and addressor. Tr. 754

3 The ALJ thus concluded Plaintiff was not under a disability within the
4 meaning of the Social Security Act at any time from the alleged onset date through
5 the date of the decision. Tr. 754.

6 VI. ISSUES

7 The question presented is whether substantial evidence exists to support the
8 ALJ's decision denying benefits and, if so, whether that decision is based on proper
9 legal standards. Plaintiff contends that the ALJ erred by improperly assessing her
10 testimony and not properly assessing medical opinions. Defendant argues that
11 Plaintiff failed to show harmful error with respect to either of the issues.

12 VII. DISCUSSION

13 A. Plaintiff's Testimony.

14 Plaintiff contends that the ALJ erred by improperly discounting her reported
15 symptoms. ECF No. 15, 5-6. Defendant counters that the ALJ reasonably
16 discounted Plaintiff's statements about the intensity, persistence, and limiting
17 effects of her symptoms. ECF No. 18, 2-3. The ALJ found that Plaintiff's
18 statements concerning the intensity, persistence, and limiting effects of her
19 symptoms were not entirely consistent with the medical and other evidence. Tr.
20 74. The ALJ found that Plaintiff's reports regarding her symptoms were "out of
21 proportion with the workup findings." Tr. 74. The ALJ proceeded to outline
22 Plaintiff's medical records in detail comparing Plaintiff's reports with the medical
23 record, but found that Plaintiff's statements were not fully consistent with the
24 objective medical evidence. The ALJ also found that Plaintiff failed to follow up
25 on physical therapy one time and that Plaintiff saw some improvement in with
26 medication.
27
28

1 It is the province of the ALJ to make credibility determinations. *Andrews* ,
2 53 F.3d at 1039. However, the ALJ's findings must be supported by specific,
3 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once
4 the claimant produces medical evidence of an underlying medical impairment, the
5 ALJ may not discredit testimony as to the severity of an impairment merely
6 because the objective evidence fails to fully corroborate the degree of pain alleged.
7 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence
8 of malingering, the ALJ's reasons for rejecting the claimant's testimony must be
9 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
10 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are
11 insufficient: rather the ALJ must identify what testimony is not credible and what
12 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
13 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

14 An ALJ may cite inconsistencies between a claimant's testimony and the
15 objective medical evidence in discounting the claimant's symptom statements.
16 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). But this
17 cannot be the only reason provided by the ALJ. *See Lester*, 81 F.3d at 834 (the
18 ALJ may not discredit the claimant's testimony as to subjective symptoms merely
19 because they are unsupported by objective evidence); *see Rollins v. Massanari*,
20 261 F.3d 853, 857 (9th Cir. 2001) (Although it cannot serve as the sole ground for
21 rejecting a claimant's credibility, objective medical evidence is a "relevant factor
22 in determining the severity of the claimant's pain and its disabling effects."). The
23 "inconsistencies" the ALJ addresses in the record, however, reflect intermittent
24 pain that waxed and waned consistent with the fibromyalgia diagnosis. *See Revels*
25 *v. Berryhill*, 874 F.3d 648 (9th Cir. 2017). Those suffering from fibromyalgia have
26 "muscle strength, sensory functions, and reflexes that are normal" and the
27 "condition is diagnosed "entirely on the basis of the patients' reports of pain and
28

1 other symptoms.” *Id.* at 656 (internal citations omitted). Although the ALJ is the
2 ultimate arbiter of credibility, clear and convincing evidence requires pointing to
3 evidence *not* supportive of the ultimate diagnosis and that *does* undermine
4 Plaintiff’s subjective complaints. The objective medical evidence supports
5 Plaintiff’s subjective complaints.

6 The ALJ also noted Plaintiff’s perceived failure to participate in treatment.
7 Tr. 407. Although failure to follow medical advice may result in an adverse
8 credibility finding, the longitudinal record illustrates that Plaintiff actively sought
9 medical treatment and followed a changing course of prescribed treatment.
10 Unexplained or inadequately explained reasons for failing to seek medical
11 treatment or follow a prescribed course of treatment can cast doubt on a claimant’s
12 subjective complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Macri v.*
13 *Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (finding the ALJ’s decision to reject the
14 claimant’s subjective pain testimony was supported by the fact that claimant was
15 not taking pain medication). The ALJ, however, relied upon one instance of
16 failing to participate in physical therapy despite the lack of referral for physical
17 therapy in the records. Tr. 749. Failure to participate in physical therapy
18 coincided with Plaintiff losing her job and health insurance. Tr. 407. “[A]n ALJ
19 cannot deny benefits because of the claimant’s inability to afford treatment.”
20 *Johnson v. Saul*, 848 F. App’x 703, 705 (9th Cir. 2021).

21 The ALJ next found that because the regime of medication caused some
22 relief in Plaintiff’s symptoms that Plaintiff’s subjective reports were not accurate.
23 Tr. 749. Plaintiff took a myriad of medications and received regular infusions
24 which she acknowledged improved symptoms greatly. Tr. 47. The ALJ, however,
25 did not address Plaintiff’s reports that when the infusions wore off, Plaintiff’s
26 symptoms returned. Tr. 1040-1053, see also Tr. 787. The ALJ also did not
27
28

1 address Plaintiff's reports that side effects from the medications caused her to take
2 FMLA leave because she was unable to perform her job. Tr. 781-82.

3 Lastly, the ALJ discounted Plaintiff's symptom reports due to a trip to
4 Seattle and her being a single mom with two teenagers. A claimant's daily
5 activities may support an adverse credibility finding if the claimant's activities
6 contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).
7 The Ninth Circuit, however, has repeatedly found that the ability to perform these
8 kinds of activities are not inconsistent with the inability to work:

9 We have repeatedly warned that ALJs must be especially
10 cautious in concluding that daily activities are inconsistent
11 with testimony about pain, because impairments that
12 would unquestionably preclude work and all the pressures
13 of a workplace environment will often be consistent with
doing more than merely resting in bed all day.

14 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014) citing *Smolen*, 80 F.3d at
15 1287 n.7 ("The Social Security Act does not require that claimants be utterly
16 incapacitated to be eligible for benefits, and many home activities may not be
17 easily transferable to a work environment where it might be impossible to rest
18 periodically or take medication." (citation omitted)); *Fair*, 885 F.2d at 603
19 ("[M]any home activities are not easily transferable to what may be the more
20 grueling environment of the workplace, where it might be impossible to
21 periodically rest or take medication.").

22 Further, Plaintiff's reported daily activities were consistent with her reported
23 symptoms. She reported that she rested during the day while her children were at
24 school. Tr. 42. During COVID her kids attended online school and she slept
25 frequently despite taking Adderall to address narcolepsy. Tr. 787. Her mother
26 also resides in the same home. Tr. 777. Plaintiff's teenaged sons take on tasks she
27 cannot do to help with the household. Tr. 786.
28

1 **B. Medical Opinions.**

2 Due to the timing of the original claim, the ALJ properly applied the prior
3 regulatory scheme to assess conflicting medical opinion evidence.¹ In weighing
4 medical source opinions, the ALJ should distinguish between three different types
5 of physicians: (1) treating physicians, who actually treat the claimant; (2)
6 examining physicians, who examine but do not treat the claimant; and (3) non-
7 examining physicians who neither treat nor examine the claimant. *Lester*, 81 F.3d
8 at 830. The ALJ should give more weight to the opinion of a treating physician
9 than to the opinion of an examining physician. *Orn*, 495 F.3d at 631. Likewise,
10 the ALJ should give more weight to the opinion of an examining physician than to
11 the opinion of a nonexamining physician. *Id.*

12 When a treating physician's opinion is contradicted by another physician,
13 the ALJ may reject the treating physician's opinion for "specific and legitimate
14 reasons" based on substantial evidence. *Andrews*, 53 F.3d at 1041. The specific
15 and legitimate standard can be met by the ALJ setting out a detailed and thorough
16 summary of the facts and conflicting clinical evidence, stating his interpretation
17

18 ¹ For claims filed on or after March 27, 2017, new regulations apply that change
19 the framework for how an ALJ must weigh medical opinion evidence. Revisions to
20 Rules Regarding the Evaluation of Medical Evidence, 2017 WL 168819, 82 Fed.
21 Reg. 5844 (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c. The new regulations
22 provide the ALJ will no longer give any specific evidentiary weight to medical
23 opinions or prior administrative medical findings, including those from treating
24 medical sources. 20 C.F.R. § 404.1520c(a). Instead, the ALJ will consider the
25 persuasiveness of each medical opinion and prior administrative medical finding,
26 regardless of whether the medical source is an Acceptable Medical Source. 20
27 C.F.R. § 404.1520c(c).
28

1 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
2 1989). The ALJ is required to do more than offer his conclusions, he “must set
3 forth his interpretations and explain why they, rather than the doctors’, are
4 correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988). “In evaluating
5 whether a claimant's residual functional capacity renders them disabled because of
6 fibromyalgia, the medical evidence must be construed in light of fibromyalgia's
7 unique symptoms and diagnostic methods. . . The failure to do so is error.” *Revels*,
8 874 F.3d at 662.

9 **1. Dr. Flavin.**

10 The ALJ assigned partial weight to medical opinions issued by Dr. Flavin,
11 Plaintiff’s treating rheumatologist. Tr. 751. Notably, “[A] rheumatologist's
12 specialized knowledge is particularly important with respect to a disease such as
13 fibromyalgia that is poorly understood within much of the medical community.”
14 *Revels*, 874 F.3d at 664 (internal citations omitted). A rheumatologist's opinion of
15 a claimant's fibromyalgia should be afforded “greater weight than those of the
16 other physicians because it is an opinion of a specialist about medical issues related
17 to his or her area of specialty.” *Beneke v. Barnhart*, 379 F.3d 587, 594 n. 4 (9th
18 Circuit 2004). In her 2017 opinion, Dr. Flavin describes symptoms of joint pain,
19 back pain, and fatigue, caused by “the condition itself” opining that Plaintiff must
20 lay down “for pain/stiffness a few times a day for 1–2 hours.” Tr. 667. She
21 explains that the Plaintiff’s medications suppress her immune system. Tr. 667. At
22 the end, after describing Plaintiff needing to lie down a minimum 3 hours per day
23 due to pain, Dr. Flavin opines that Plaintiff would miss work 4 or more days per
24 month. Tr. 668. Though Dr. Flavin failed to explain in the section labeled “Please
25 explain,” in the context of the document, Dr. Flavin’s restrictions are based on the
26 symptoms of the conditions described earlier in the document. Dr. Flavin clarified
27 in the 2021 opinion that flare up from arthritis and fibromyalgia would cause
28

1 absenteeism. Tr. 1344. In the 2021 opinion Dr. Flavin indicated that the
2 limitations existed since at least June 1, 2015. Tr. 1345. The ALJ afforded little
3 weight to this portion of Dr. Flavin’s opinion because the ALJ found that the
4 treatment notes do not support the frequency of flare-ups and “she does not seem
5 to account for improvement with medication.” Tr. 751.

6 The Court finds that the ALJ erred. The ALJ does not explain *how* the
7 treatment notes contradict or fail to support Dr. Flavin’s opinion. Tr. 751. Nor
8 does the ALJ provide support for why she concludes that Dr. Flavin’s opinion fails
9 to account for medication-based improvement. Tr. 751. Bare conclusions without
10 support from the record does not constitute the specific and legitimate evidence
11 needed to overcome the medical opinion of a treating physician. The ALJ’s
12 opinion similarly fails to afford the particularly great weight that case law requires
13 that a treating rheumatologist’s specialized knowledge be given.

14 **2. Dr. Ho.**

15 The ALJ afforded great weight to Dr. Ho’s opinion. Tr. 752. Dr. Ho
16 provided a consultative opinion and did not examine Plaintiff. *Id.* The ALJ found
17 that Dr. Ho’s opinion was consistent with treatment notes and claimant’s
18 statements as well as improvement with minimal treatment. *Id.*

19 The Court finds that the ALJ erred analyzing Dr. Ho’s opinion. The ALJ
20 failed to provide support from the medical records supporting her analysis, instead
21 the ALJ provides that Dr. Ho “supported her opinion with review of and citation to
22 the record” and Dr. Ho’s “opinion is consistent with rheumatology and primary
23 care treatment notes...” without providing details or examples from the medical
24 record. Tr. 752. As a non-examining physician, Dr. Ho’s opinion should be
25 afforded less weight than treating physicians absent specific and legitimate reasons
26 to give the treating physician less weight. *Andrews*, 53 F.3d at 1041. The ALJ
27 offered conclusions, but no support. The ALJ’s analysis lacks interpretations and
28

1 an explanation rooted in the medical records as required by case law. *Embrey*, 849
2 F.2d at 421-22.

3 **C. Remand for Benefits.**

4 The district court may “revers[e] the decision of the Commissioner of Social
5 Security, with or without remanding the cause for a rehearing.” 42 U.S.C.

6 § 405(g). Whether to reverse and remand for further proceedings or to calculate
7 and award benefits is a decision within the discretion of the district court. *See*
8 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000); *Smolen*, 80 F.3d at 1292.

9 Under the credit-as-true rule, a remand for benefits is proper where: 1) the
10 ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether
11 claimant testimony or medical opinion; 2) the record has been fully developed and
12 further administrative proceedings would serve no useful purpose; and 3) if the
13 improperly discredited evidence were credited as true, the ALJ would be required
14 to find the claimant disabled on remand. *Revels*, 874 F.3d at 668. Even where the
15 three prongs have been satisfied, however, the Court will not remand for
16 immediate payment of benefits if “the record as a whole creates serious doubt that
17 a claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

18 In this case, as set forth above, all three parts of the standard are met. First,
19 after two administrative hearings and reams of medical records, including two
20 opinions from Plaintiff’s treating rheumatologist, the record has been fully
21 developed. Second, as discussed above, the ALJ failed to provide legally sufficient
22 reasons for rejecting Dr. Flavin’s opinion and Plaintiff’s subjective complaints.
23 Lastly, had the ALJ credited Dr. Flavin’s opinion and Plaintiff’s subjective
24 complaints, she would have been required to find Plaintiff eligible for benefits.
25 The vocational expert testified that a person who needed to lie down daily to nap
26 and regularly missed more than two days of work a month would be
27 unemployable. Tr. 798 -98. Finally, the Court further has no serious doubts as to
28

1 whether Plaintiff is disabled based on her testimony and the treating physician's
2 opinions. Under these circumstances, the Court exercises its discretion to remand
3 this matter for a finding of disability.

4 **VIII. CONCLUSION**

5 Having reviewed the record and the ALJ's findings, the Court concludes the
6 ALJ's decision is not supported by substantial evidence and is based on legal error.
7 Accordingly, **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is
9 **GRANTED.**

10 2. This case is **remanded** for an award of benefits from the alleged onset
11 date of June 1, 2015.

12 3. Defendant's Motion for Summary Judgment, ECF No. 18, is
13 **DENIED.**

14 4. The District Court Executive is directed to file this Order and provide
15 a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for
16 Plaintiff and the file shall be **CLOSED.**

17 DATED September 27, 2023.




JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE